



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 23, 1984

Mygraph
SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Central Intelligence Agency
National Security Council
Department of Defense
Department of State
General Services Administration
Office of Personnel Management

SUBJECT: Justice Department proposed testimony on H.R. 4681
"Federal Polygraph Limitation and Anti-Censorship
Act of 1984"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than ASAP but no later than noon, February 27, 1984. Hearings are scheduled for 2/29.

Questions should be referred to Hilda Schreiber
(395-4650) or to -----
the legislative analyst in this office.

Naomi R. Sweeney
Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

DRAFT

STATEMENT

OF

RICHARD K. WILLARD
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

COMMITTEE ON THE POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 4681
THE FEDERAL POLYGRAPH LIMITATION
AND ANTI-CENSORSHIP ACT OF 1984

ON

FEBRUARY 29, 1984

Thank you, Madame Chairwoman. It is a pleasure to appear before your subcommittee once again to discuss the problem of unauthorized disclosure of classified information. If nothing else, I believe that we can all agree that the debate surrounding this issue has removed any doubt as to the harm caused to national security by leaks. The collection and analysis of intelligence is vital to the conduct of an effective foreign policy. The loss of information sources or the failure of sources to cooperate with the United States due to the fear of exposure through leaks, has been a major problem in recent years. The intelligence committees of the Congress have issued several reports to this effect. Most recently, the members of this subcommittee and the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee held a joint, closed hearing to receive evidence on the damage caused by leaks. I think that we can all agree that a responsible solution to this problem is long overdue.

In an attempt to address this problem, President Reagan, on March 11, 1983 issued National Security Decision Directive 84 (NSDD-84). That directive included a number of measures to prevent the unauthorized disclosure of classified information. Two of those measures have been the subject of particular congressional concern.

First, in attempting to solve leak cases, we have long recognized that the polygraph is an invaluable investigative tool. Therefore, NSDD-84 authorized agencies to broaden somewhat the use of polygraphs in leak investigations, consistent with constitutional and other safeguards.

Second, in order to control the unauthorized and often inadvertent release of classified information contained in the writings of former government officials, the directive required the use of prepublication clearance agreements. These agreements, which permit the government to delete properly classified information, have been upheld as constitutional by the Supreme Court in Snepp v. United States, 444 U.S. 507 (1980), and would apply only to officials with access to sensitive compartmented information (SCI), the most highly classified category of intelligence data.

Last year, however, Congress adopted two separate amendments largely prohibiting the Administration from taking any action to implement these initiatives until April 15 of this year. The Administration has consistently expressed a willingness to discuss these issues and to modify its program in order to satisfy legitimate Congressional concerns. Recently, the

President decided to suspend the effectiveness of paragraphs 1(b) and 5 of the directive (authorizing the use of prepublication clearance agreements and polygraphs in leak investigations, respectively). This has been done to permit consultations with Congress to continue, unaffected by an ongoing legislative dispute on the provisions of NSDD-84. Ultimately, we hope to achieve a bipartisan solution to this problem.

We oppose H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act of 1984, because it does not attempt to address the problem posed by leaks, but merely would block implementation of two components of NSDD-84. Because these portions of NSDD-84 have been withdrawn, we believe that a further discussion of H.R. 4681 would serve no useful purpose. We recognize that many members of Congress, including the members of this Committee and Chairman Brooks, have serious concerns about the effect of the President's directive on constitutional liberties and civil service protections. I can assure you that we share your concern with protecting these rights and believe that the directive and accompanying regulations and agreements were drafted to incorporate all necessary safeguards. However, we remain prepared to consider other alternatives in an effort to arrive at a mutually acceptable solution to this problem.

However, I must reiterate, Madame Chairwoman, that the damage from leaks is a very real problem which cannot be ignored or swept under the rug. The recent events in the Middle East, as well as the growing incidence of terrorist attacks on American personnel around the globe, serve as bitter reminders of the need for accurate intelligence and early warning capabilities. And as I have said, the unauthorized disclosure of information relating to intelligence sources and methods has caused foreign agents to refuse to cooperate with us as well as rendering useless expensive and sometimes irreplaceable technical collection systems. This is one of the most serious problems facing the intelligence community today.

I would like to conclude, therefore, by urging this Committee and the Congress as a whole to reject H.R. 4681 and instead to give careful consideration to designing an alternative program which will strike the proper balance between guaranteeing constitutional liberties and protecting the confidentiality of vital intelligence sources. Having blocked implementation of NSDD-84, we believe that Congress cannot escape its responsibility to work with the Administration in developing a solution to this very serious problem.

That concludes my prepared statement. I would be happy to answer any questions you might have.

STATEMENT
OF
RICHARD K. WILLARD
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE
BEFORE
THE
SUBCOMMITTEE ON CIVIL SERVICE
OF THE
HOUSE COMMITTEE ON THE
POST OFFICE AND CIVIL SERVICE
CONCERNING
H.R. 4681
THE FEDERAL POLYGRAPH LIMITATION
AND ANTI-CENSORSHIP ACT OF 1984
ON
FEBRUARY 29, 1984

Thank you, Madame Chairwoman. I am here today before your subcommittee to discuss the problem of unauthorized disclosure of classified information. The collection and analysis of intelligence is vital to the conduct of an effective foreign policy. The loss of information sources or the failure of sources to cooperate with the United States due to the fear of exposure through leaks, has been a major problem in recent years. The intelligence committees of the Congress have issued several reports to this effect. Most recently, the members of this subcommittee and the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee held a joint, closed hearing to receive evidence on the damage caused by leaks. I think that we can all agree that a responsible solution to this problem is in order.

In an attempt to address this problem, President Reagan, on March 11, 1983, issued National Security Decision Directive 84 (NSDD-84). That directive included a number of measures to prevent the unauthorized disclosure of classified information. Two of those measures have been the subject of particular congressional concern.

First, in attempting to solve cases involving leaks of

classified information, we have long recognized that the polygraph, when used in conjunction with other investigative techniques, can provide valuable information. Therefore, NSDD-84 authorized agencies to broaden somewhat the use of polygraphs in leak investigations, consistent with constitutional and other safeguards.

Second, in order to control the unauthorized and often inadvertent release of classified information contained in the writings of former government officials, the directive required the use of prepublication clearance agreements. These agreements, which permit the government to delete properly classified information, have been upheld as constitutional by the Supreme Court in Snepp v. United States, 444 U.S. 507 (1980), and would apply only to officials with access to sensitive compartmented information (SCI), the most highly classified category of intelligence data.

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We oppose H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act of 1984, because it does not attempt to address the problem posed by leaks, but merely would block implementation of two components of NSDD-84. Because these portions of NSDD-84 have been withdrawn, we believe that a further discussion of H.R. 4681 would serve no useful purpose. We recognize that many members of Congress, including the members of this Committee and Chairman Brooks, have serious concerns about the effect of the President's directive on constitutional liberties and civil service protections. I can assure you that we share your concern with protecting these rights and believe that the directive and accompanying regulations and agreements were drafted to incorporate all necessary safeguards. However, we remain prepared to consider other alternatives in an effort to arrive at a mutually acceptable solution to this problem.

However, I must reiterate, Madame Chairwoman, that the damage from leaks is a very real problem which cannot be ignored

or swept under the rug. Recent international events, especially the growing incidence of terrorist attacks on American personnel around the globe, serve as bitter reminders of the need for accurate intelligence and early warning capabilities. And, as I have said, the unauthorized disclosure of information relating to intelligence sources and methods has caused foreign agents to refuse to cooperate with us as well as rendering useless expensive and sometimes irreplaceable technical collection systems. This is one of the most serious problems facing the intelligence community today.

Aside from the general question of leaks of classified information, this bill would also interfere with the investigative activities of certain components of the Justice Department which currently utilize the polygraph. As you know, the Federal Bureau of Investigation has important national security responsibilities in the counterintelligence area, responsibilities fully as important as those assigned to the CIA and NSA. Moreover, even ordinary law enforcement activity requires the most careful security precautions to ensure successful enforcement of the laws and even to protect the lives of government agents. Therefore, the FBI, and to a lesser extent other components of the Department such as the Drug Enforcement Administration and the Marshals Service, have found it necessary to use the polygraph in two situations.

Although not used routinely in screening applicants for employment, the FBI may request a polygraph examination to resolve serious uncertainties and allegations. For instance, the applicant may have had prior contact with criminal elements or foreign intelligence services which raise questions about his reliability. A polygraph may also be necessary to check the background of foreign nationals where ordinary investigative techniques are not available (such as behind the iron curtain) or where relatives were left behind in a potential hostage situation. Where such specific issues have been raised, an employee may be requested to take a polygraph examination, and if he or she refuses, a negative implication may be drawn which could be one factor in denying the subject employment. In fiscal year 1983, the FBI conducted 116 such polygraph examinations involving 1% of total FBI employment applications.

The polygraph may also be used in administrative investigations. Section 3(b) of the bill permits an agency to request an employee to take a polygraph examination if administered as part of an investigation into criminal misconduct or an unauthorized disclosure of classified information. This section, however, does not cover all possible uses of the polygraph in administrative inquiries. For instance, an employee may leak information

which is not classified (most law enforcement records, including the names of informers, are not classified) and the leak may not be subject to criminal prosecution. In fiscal year 1983, the FBI administered 40 polygraph examinations in such administrative investigations.

The most notable such example in recent years were the leaks surrounding the Department's investigation of the ABSCAM scandal. Following those leaks, Attorney General Civiletti ruled that an employee may be requested to take a polygraph exam in the investigation of an unauthorized disclosure of information and that an adverse inference may be drawn from the employee's refusal to submit to such an examination. Both the Civiletti policy and the FBI's polygraph guidelines, which were also promulgated in 1980 under Mr. Civiletti, would be invalidated by H.R. 4681. When dealing with these sensitive national security and law enforcement issues, the Department of Justice believes it necessary to have the authority to use the polygraph where appropriate. Therefore, we oppose those provisions of H.R. 4681 which would further restrict polygraph use.

I would like to conclude, therefore, by urging this Committee and the Congress as a whole to reject H.R. 4681 and, instead, to give careful consideration to designing an alterna-

tive program which will strike the proper balance between guaranteeing constitutional liberties and protecting the confidentiality of vital intelligence sources. The Administration has indicated its willingness to work with the Congress by suspending those provisions of NSDD-84 that aroused the greatest concern. We hope that the Congress will, in turn, work cooperatively with the Administration to address this serious problem.

That concludes my prepared statement. I would be happy to answer any questions you might have.

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DIRECTOR OF CENTRAL INTELLIGENCE
Security Committee

SECOM-D-043

24 February 1984

MEMORANDUM FOR: Chief, Legislative Division
Office of Legislative Liaison

FROM:

Chairman

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SUBJECT: Proposed Testimony of Richard K. Willard

REFERENCE: Your memo OLL 84-0692 dated 23 February 1984

1. Referent memorandum asked for comments on Mr. Willard's proposed testimony on H.R. 4681, Representative Brooks's bill to limit use of prepublication review requirements and the polygraph by federal agencies.

2. The proposed testimony mistakenly asserts that H.R. 4681 "merely would block implementation" of those sections of NSDD-84 which bear on prepublication review and on use of the polygraph. Further, the proposed testimony speaks only to the impact of the Brooks bill on efforts to combat leaks. H.R. 4681 would, if enacted, not only block key provisions of NSDD-84 but would also deny the Intelligence Community the use of several key security measures that were in effect long before NSDD-84 was signed. Prepublication review requirements have been an implicit requirement of nondisclosure agreements governing access to SCI for at least 30 years. They were made explicit in the agreement which came into broad Intelligence Community use in July 1981. Factors to be considered in addressing the prepublication review provisions of H.R. 4681 include:

- a. Little, if any, sensitive intelligence in CIA and NSA is not available in some manner to consumers in other Intelligence Community agencies. It is not consistent for CIA and NSA to continue to require their employees to submit their proposed publications on intelligence matters for prior review, as H.R. 4681 would permit, but to prohibit levying of the same requirement on persons in other agencies who have access to the same data.
- b. Virtually everyone in the Intelligence Community now approved for access to SCI has agreed to prepublication review, most of them before the advent of NSDD-84. There was no known resistance to this requirement by intelligence consumers, who understood the need for such protection, both for the information and for themselves.

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- c. The prepublication review requirement applies only to intelligence related writings, not, as reported in the press or as stated in section 2(b)(2) of H.R.4681, to the "free flow of unclassified information" or to "open debate on matters of national importance" so long as those matters don't include sensitive intelligence data.

3. H.R. 4681 would prohibit polygraph screening for other than "employees" of CIA and NSA. This could be construed to outlaw such screening for military assignees to NSA and CIA, and for contractors of both agencies. The bill would clearly prohibit polygraph screening started within Defense before the advent of NSDD-84 for access to particularly sensitive information. It might prohibit use of the polygraph to check the bona fides of agents being used by CIA and of informants used by FBI and the Drug Enforcement Agency. These effects would be much farther reaching than a roll-back of NSDD-84.

4. We believe that the Congress needs to be informed of the broad ranging nature of H.R. 4681; the fact that it would do far more than roll back what NSDD-84 attempted; and of the essential need for the Congress thoroughly to explore the implications of restrictions on security procedures before legislating any changes.

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cc: Director, Intelligence Community Staff

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